The Amended BiOp modified slightly the 2000 BiOp that formed the basis of the Petitioners' complaint. In part, the Amended BiOp allowed for releases of 25,000 cfs rather than 21,000 cfs during the critical summer months.[4] The Amended BiOp also allowed the Corps to release water in excess of such amounts if the Corps accelerated its plan for habitat augmentation by acquiring 1,200 acres of shallow water habitat for the pallid sturgeon by July 1, 2004, which the Corps did.[5] The Amended BiOp retained the requirement that the Corps implement a "spring rise," along with nearly all of the other provisions of the 2000 BiOp, including, but not limited to implementation of an adaptive management program, flow enhancement efforts, mechanical habitat construction, and species propagation and augmentation.[6] The Corps currently is implementing the amended RPA, which spans 60 pages and represents a comprehensive plan to avoid jeopardizing the Missouri River species. JA IX:06797-856.

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[4]It was undisputed that flows of 21,000 cfs would be insufficient to maintain minimum navigation service and downstream water supply uses, including thermal power generation, J.A. XI:08338.

[5]Petitioners, again then lead by American Rivers, attempted to bring a separate challenge against this provision and the Corps' compliance with it. The district court dismissed and the group appealed. *American Rivers, Inc. v. U.S. Army Corps of Engineers*, 2004 WL 2905281 (D. Minn. Dec. 10, 2004). Ultimately, however, American Rivers and the Petitioners voluntarily dismissed their appeal.

[6]The Corps currently is in the process of developing the details of the "spring rise" having recently completed a public process involving the Missouri River stakeholders. A description of the proposed plan is available on the Corps of Engineers' Northwest District website at http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/TechCriteria2006DraftAOP.pdf.

After the Amended BiOp, FEIS, and ROD were issued, various parties in the consolidated litigation filed motions for summary judgment. The Petitioners challenged FWS' modification of the 2000 BiOp, claiming it violated the ESA on substantive grounds. The District Court carefully addressed and rejected each of the Petitioners' substantive arguments. 363 F. Supp. 2d at 1156-60 (Pet. App. at 41a-49a). Petitioners also argued that the FEIS did not provide an adequate explanation for the selection of the Corps' preferred alternative over the alternative preferred by Petitioners. In rejecting that argument, the court stated:

> American Rivers fails to demonstrate why the detailed analyses and comparisons included in Chapter Seven of the Final EIS are insufficient under NEPA. The Court thus finds that the Corps' decision to implement the [Corps' preferred alternative] was made in good faith after proper consideration of the alternatives, and is therefore reasonable and complies with NEPA.

Id. at 1168 (Pet. App. at 62a-63a).

On appeal to the Eighth Circuit, Petitioners continued to make a number of substantive claims involving the Amended BiOp. In addition, Petitioners claimed that the conclusions in the Amended BiOp were contradicted by factual findings contained in the Amended BiOp. 421 F.3d at 633-36 (Pet. App. at 20a-25a). The court rejected these arguments, finding that the FWS had demonstrated a rational connection between the changes in circumstances since the 2000 BiOp was issued and the changes contained in the Amended BiOp. *Id.* at 635 (Pet. App. at 23a).

Regarding Petitioners' claim that the FEIS did not sufficiently explain the choice of the Corps' preferred alternative, the court stated:

> Contrary to what American Rivers seems to suggest, there is no further NEPA or Administrative Procedure Act requirement to repackage the

> information in the summary tables into prose one-to-one comparisons of the [Corps' preferred alternative] with each of the other alternatives. We conclude that the comparisons provided in the EIS "cogently explain why [the Corps] has exercised its discretion in a given manner." *Motor Vehicle Mfrs.*, 463 U.S. at 48, 103 S. Ct. 2856.

Id. at 637 (Pet. App. at 26a).

REASONS FOR DENYING THE PETITION

The Court of Appeals adopted the appropriate standard of review. It correctly applied that standard to the administrative record before it. Nothing in the court's analysis conflicts with the decisions of this Court or any other Circuit. Therefore, further review by this Court is unwarranted.

I. THE COURT OF APPEALS APPLIED THE STANDARD OF REVIEW ESTABLISHED BY THIS COURT.

This Court has articulated on numerous occasions the appropriate standard for review of an agency decision under 5 U.S.C. § 706(2). The scope of review is narrow, and a court may not substitute its judgment for the agency's. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983). The agency must provide an explanation for its decision that demonstrates a rational connection between the facts found and the decision made. *Id.* The court is then limited to deciding whether the decision was based on consideration of relevant factors and whether there has been a clear error of judgment. *Id.*, 103 S. Ct. at 2866-67. The court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.*, 103 S. Ct. at 2867 (quoting *Bowman Transportation, Inc. v Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 95 S. Ct. 438, 442 (1974)). In reviewing a decision, a court must make a "'searching and careful'" review of the administrative record. *Marsh v. Oregon Natural*

Resources Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 823 (1971)). When the analysis requires a "'high level of technical expertise,'" the reviewing court must defer to the informed discretion of the responsible agency. *Id.* at 375, 109 S. Ct. at 1861 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S. Ct. 2718, 2731 (1976)).

The Court of Appeals stated the applicable standard in a way that shows it was using the standard articulated by this Court:

> We review the actions of the Corps and FWS under the Administrative Procedure Act "to determine whether they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ubbelohde*, 330 F.3d at 1027 (quoting 5 U.S.C. § 706(2)(A)). An arbitrary and capricious action is one in which:
>
> > the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
>
> *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the United States Dep't. of Agric.*, 266 F.3d 889, 894 (8th Cir.2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "If an agency's determination is supportable on any rational basis, we must uphold it." *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763. "When the resolution of the dispute involves primarily issues of fact and

> analysis of the relevant information 'requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.'" *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir.1999) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

421 F.3d at 628 (note 6 omitted) (emphasis supplied) (Pet. App. at 10a).

The Petitioners assign error by lifting the underscored sentence from the larger context in which the Court of Appeals placed it. The Petitioners assert (unremarkably) that the APA does not allow a Court to "make up a rationale out of the record," Petition at 18-19, n. 10, and suggest that the Eighth Circuit fabricated a justification for the agencies' actions that the agencies themselves never offered. The Petition is based entirely on that premise, which is patently false.

The agencies' explanations are set forth in: 1) the Master Manual, ROD, and supporting FEIS; and 2) the Amended BiOp. Each of these documents was supported by a voluminous administrative record. The Court of Appeals conducted a searching and thorough review of the administrative record to determine whether the Master Manual, the FEIS, and the Amended BiOp were arbitrary and capricious. That is precisely what the APA and this Court require of a reviewing court. *See, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. at 378, 109 S. Ct. at 1861 (review under the APA is based on agency rationale and support for it in the record). *Accord* Petition at 18 (acknowledging same).

II. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD TO THE FACTS OF THIS CASE.

The record in this case contains detailed explanations by the Corps and FWS supporting their decisions. A brief review of that

record establishes that the Court of Appeals correctly applied the appropriate standard to the record before it.[7]

A. The FEIS and ROD Set Forth the Corps' Rationale Both in Summary Form and in Detailed Analysis.

NEPA requires that the agency provide a detailed statement that will allow a reviewing court to determine whether the agency has made a good faith effort to consider the values NEPA protects. *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1128. The statement must explain the agency's analysis. *Id.* However:

> We need not "fly speck" an EIS for inconsequential or technical deficiencies. Instead, we consider "whether the agency's actual balance of costs and benefits was arbitrary or clearly gave insufficient weight to environmental va'ues."

Id. (quoting *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1300 (8th Cir 1976), *cert. denied*, 430 U.S. 922, 97 S. Ct. 1340, 51 L. Ed. 2d 601 (1977)) (other citations omitted). The court's only role is to make sure that the agency has considered the environmental impacts of its proposed actions. *Missouri Coalition for the Environment v. Corps of Engineers*, 866 F.2d 1025, 1032 (8th Cir.), *cert. denied*, 493 U.S. 820, 110 S. Ct. 76, 107 L. Ed. 2d 42 (1989).

The Petitioners assert that the Corps never explained why it selected its preferred alternative. To the contrary, the Corps first addressed the selection of the preferred alternative in the cover letter accompanying the FEIS, noting that the preferred alternative includes measures to conserve more water during droughts and varies levels in the reservoirs to benefit fish and wildlife. The Corps also noted

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[7]By filing this opposition, the Joint Respondents do not endorse all aspects of the ROD, FEIS, or Amended BiOp. The Joint Respondents contend only that the agencies' decisions are adequately supported.

the adoption of a comprehensive set of measures, the Missouri River Recovery Implementation Program ("MRRIP"), not technically part of the preferred alternative, which was "directed toward the recovery of Missouri River species provided protection under the ESA and the ecosystem on which they depend." JA X:07185.

Volume I, Part 1 of the FEIS, encompassing some 515 pages, provides an overview of the existing environment and the alternatives submitted to the Corps for consideration in developing the 2004 Master Manual. JA X:07127-642. Part 2, encompassing an additional 387 pages, addresses the various alternatives the Corps selected for detailed analysis and comparison. JA X:07643-0830.

In discussing the alternatives selected, the Corps identified a key component of any successful plan with so many competing interests - compromise:

> As the Corps embarked on its efforts to identify a preferred alternative . . . it was apparent that considerable controversy would surface if this alternative were the [2000] BiOp RPA. If acceptance of a Water Control Plan were to occur, the various basin interests would have to reach some form of compromise.

JA X:07645. In order to address these concerns, the Corps selected five alternative plans for detailed presentation: the modified conservation plan ("MCP"), which did not include the spring rise and summer low flow contained in the 2000 BiOp RPA, and four GP alternatives, so designated because they included the Gavins Point Dam releases recommended in the 2000 BiOp RPA at four different levels of spring rise and summer low flow. JA X:07646. All of Chapter 7 of the FEIS, 257 pages, presents a detailed analysis and comparison of the effects of the various plans in five categories: hydrology; sedimentation, erosion and ice processes; water quality; environmental effect; and economic effect. JA X:07660-917.

Chapter 8 addressed the selection of the preferred alternative and the effects of that alternative. In the Introduction to the chapter,

the Corps specifically addressed some factors that argued against selecting any of the GP alternatives. The Corps noted:

- A January 2002 National Academy of Sciences' National Research Council Report highlighted the need for an adaptive management approach and a lack of understanding of the factors that are limiting spawning and recruitment of the pallid sturgeon.

- Engineering analyses of the Gavins Point Dam spring release recommendations showed that they would not be effective in restoring habitat for the least tern or piping plover.

- Engineering analyses of summer low flow recommendations indicated they would not be effective in attaining additional shallow water habitat.

- The Corps' implementation of the MRRIP in conjunction with the preferred alternative, which the Corps believed would better address the needs of the threatened and endangered species.

JA X:07920-21. The Corps concluded:

> The rationale for selecting the [preferred alternative] is a composite of analyses, information briefings, technical expertise, and comments concerning the resources evaluated as part of the Study. The Corps believes that the [preferred alternative], when combined with the other measures under MRRIP, conserves more water in the upper three reservoirs during extended droughts, meets the needs of the ESA listed fish and wildlife species, is consistent with the Corps' responsibilities under environmental laws and Tribal trust responsibilities, and provides for the Congressionally authorized uses of the System.

JA X:07923. The basis of the Corps' decision is made clear in the FEIS, and the Corps is under no obligation to re-package its reasoning to make it easier for the Petitioners to discern.

The Petitioners argued that the FEIS was nonetheless deficient because it did not contain an express statement regarding why the FEIS selected the MCP rather than Petitioners' preferred alternative. Of course, this ignores the numerous statements of the Corps' rationale summarized briefly above. It also ignores, as the Court of Appeals noted, the extensive comparative data contained in the FEIS. The court stated: "We conclude that the comparisons provided in the [FEIS] 'cogently explain why [the Corps] has exercised its discretion in a given manner.'" 421 F.3d at 637 (quoting *Motor Vehicle Manufacturers Association*, 463 U.S. at 48, 103 S. Ct. at 2869) (Pet. App. at 22a).

The ROD provides additional explanation for the decision. In the ROD, the Corps' responsibilities under the ESA were expressly addressed and the new RPA requirements contained in the Amended BiOp directly related to the Master Manual were adopted. JA XI:08265-66. The Corps also noted the scope of its review leading to adoption of the Master Manual:

> Careful consideration was given to the overall public interest and the economic, social, cultural and environmental effects throughout the development of the Selected Plan, which is the environmentally preferred plan. All applicable laws, Executive Orders, regulations and local plans were considered in evaluating the alternatives. Over 500 alternatives were addressed in four draft EISs and the FEIS. The analysis of these alternatives, and the comments and discussions they engendered are incorporated here by reference.

JA XI:08267.

Given the breadth of the Corps' investigation and the thoroughness of its presentation, it is disingenuous for Petitioners to

suggest that the Corps failed to provide a rationale for its decision. Nevertheless, Petitioners pursue that claim because they are disappointed that neither the Corps, the District Court, nor the Court of Appeals agreed with Petitioners' view about the appropriate flow regime for the Missouri River. They want this Court to undertake a *de novo* review of the record and substitute its judgment for that of the agencies.

B. The Amended BiOp Sets Forth the FWS' Rationale Both in Summary Form and in Detailed Analysis.

Section 7(a)(2) of the ESA requires only that Federal agencies avoid jeopardizing listed species or destroying or adversely modifying designated critical habitat. 16 U.S.C. § 1536(a)(2). In developing an RPA, FWS is not compelled to select one particular RPA over another. As the United States Court of Appeals for the Ninth Circuit correctly explained in the context of Colorado River dam operations:

> [U]nder the ESA, the Secretary [of the Interior] was not required to pick the first reasonable alternative the FWS came up with in formulating the RPA. The Secretary was not even required to pick the best alternative or the one that would most effectively protect the Flycatcher from jeopardy. The Secretary need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency.

Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998) (citations omitted). Moreover, "under the ESA, the Secretary was not required to explain why he chose one RPA over another, or to justify his decision based solely on apolitical factors." *Id.* In this case, FWS selected an RPA that in its view avoided a substantive violation of the ESA. The fact that the Petitioners would have liked to have seen lower flows in one element of the RPA is irrelevant as a matter of law.

Contrary to the Petitioners' assertions, the rationale for the Amended BiOp's conclusions was stated at great length by the FWS.

The FWS noted that engineering studies produced by the Corps after the 2000 BiOp indicated that the recommended flows would not accomplish, and might well hinder, some of the habitat objectives the 2000 BiOp sought to achieve. The Amended BiOp expressly stated that FWS "accepted the Corps' results regarding the efficacy of the required RPA flow modifications to create habitat." JA IX:06633.

The FWS also undertook a detailed risk analysis of the proposed federal action for each species. JA IX:06752-96. As to the least tern, the FWS spent one and a half pages summarizing the specific information it relied on and concluded:

> After reviewing the current status of the interior least tern, the updated environmental baseline for the action area, the effects of the Corps' new proposed RPA elements, and the cumulative effects, it is the [FWS'] opinion that the 2000 Biological Opinion RPA, modified by the omission of flow changes and the addition of the proposed new RPA elements, will avoid jeopardizing the continued existence of the interior least tern.

JA IX:174-75. After almost three pages summarizing the specific information relied on, the FWS reached a similar conclusion regarding the piping plover. JA IX:06790-93. With respect to the pallid sturgeon, however, the FWS concluded that the Corps' proposal did not adequately protect the species. JA X:06794-96.

The FWS then undertook a detailed analysis of the RPA for each species. The review for the least tern and the piping plover only considered the 2000 BiOp RPA as modified by the Corps' proposals because of FWS' conclusion that these measures avoided jeopardizing these species. JA IX:06797-834. For the pallid sturgeon, however, the FWS went further, imposing four new RPA requirements expressly intended to substitute for elements of the original RPA eliminated or modified in the Corps' proposal. JA IX:06845-53. These conditions expressly included a spring rise in 2006, with modifications to that requirement based on an annual review of data collected and analyzed. JA IX:06849. The Amended

BiOp also clearly indicated that the construction of additional habitat would be necessary to comply with ESA requirements if the summer low flow were modified. JA IX:06852-53.

The record, carefully reviewed by the Court of Appeals, demonstrated that the habitat to be constructed was roughly equivalent to the habitat FWS expected would be created by the original summer low flow. Therefore, the court properly concluded that there was a rational connection between the facts in the record and the decision to eliminate the summer low flow based on, among other things, the construction of the additional habitat. 421 F.3d at 634 (Pet. App. at 22a). The court also correctly concluded that there is no requirement that every detail supporting an agency's decision be stated expressly in the summary of the agency's rationale. *Id.* at 637 (Pet. App. at 26a). As this Court has stated, it is only necessary that "the agency's path may reasonably be discerned." *Motor Vehicle Manufacturers Association*, 463 U.S. at 43, 103 S. Ct. at 2867. Here, the Eighth Circuit correctly found that FWS' path could be discerned from the Amended BiOp.

Even this brief overview of the Amended BiOp demonstrates that FWS stated a sufficient rationale for its choice of alternative RPA requirements. The Court of Appeals recognized this rationale and found it was supported by the record, nothing more. To be sure, the record also contains evidence that can be used to argue for retention of a low summer flow. In a case of this complexity involving significant biological uncertainty, it would be unusual if such evidence did not exist. Petitioners argue that this evidence means that the FWS decision was irrational, an argument rejected by both the District and Circuit Courts. As demonstrated above, FWS' conclusion and the decisions of the courts below were amply supported by the record.

III. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS' DECISION CREATES NO CONFLICT.

Petitioners complain that the agencies failed to provide a discrete prose explanation of each graphic factor the agencies relied on. They claim that other circuits have imposed such a requirement, and the Eighth Circuit is in conflict with those circuits. But no decision of this or any other court, including the cases cited by Petitioners, has imposed the requirement Petitioners urge.

In some of the cases cited by the Petitioners, the court found, after a careful and searching review of the record, that there was insufficient evidence in the record to support the decision. *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091-93 (9th Cir. 2005) (administrative record contained no evidence to support ESA no jeopardy determination); *National Association of Home Builders v. Norton*, 340 F.3d 835, 846-52 (9th Cir. 2003) (administrative record contained no evidence to support critical factor in ESA listing decision); *W.R. Grace & Co. v. U.S. Environmental Protection Agency*, 261 F.3d 330, 340-44 (3rd Cir. 2001) (limited administrative record contained no evidence supporting standards set in clean up order); *Sierra Club v. U.S. Environmental Protection Agency*, 167 F.3d 658, 663-66 (D.C. Cir. 1999) (only evidence in record contradicted standards adopted by agency for medical waste incinerators). The court in this case, however, found that evidence in the record supported the conclusions reached in the Amended BiOp and the FEIS. These decisions do not conflict, but simply apply the same standards to vastly different records.

This group of cases cannot be construed to impose a requirement that every bit of evidence an agency relies on in making its determination must not only be found in the administrative record, but also must be repeated in the actual decision document. Such a requirement would be virtually impossible in a case, like this one, with such a voluminous record. Such a requirement also makes no sense in light of the well established principle that the reviewing court must undertake a careful and searching review of the record.

If the agency were required to recite each bit of relevant evidence in the decision document, no review of the record would be necessary.

In the remaining cases cited by Petitioners, the court found, after a careful and searching review of the record, that the agency had not articulated any explanation for the decision. *New York v. U.S. Environmental Protection Agency*, 413 F.3d 3, 33-36 (D.C. Cir. 2005) (administrative record contained no explanation how EPA can enforce requirement when its rule change does not require maintenance of data necessary to determine compliance); *JSG Trading Corp. v. U.S. Department of Agriculture*, 176 F.3d 536, 543-46 (D.C. Cir. 1999) (no justification in record of administrative proceeding charging commercial bribery to support judicial officer's adoption of a per se test inconsistent with agency's prior decisions); *Chemical Manufacturers Association v. Environmental Protection Agency*, 899 F.2d 344, 357-60 (5th Cir. 1990) (court could not discern from the administrative record the criteria used by agency to determine whether quantities of pollutants were substantial); *American Municipal Power-Ohio, Inc. v. Federal Energy Regulatory Commission*, 863 F.2d 70, 166 (D.C. Cir. 1988) (agency failed to state in rate case which of two competing standards it used in reaching decision).

The decision in *New York v. U.S. Environmental Protection Agency* is particularly relevant in this case. In addition to finding that there was no explanation for a change in the record keeping provisions of the rule at issue in that case, the court also addressed a change in the emission standards in the same rule. The EPA acknowledged that its rule was based on incomplete data and that it could not reasonably quantify the impact of this rule change. 413 F.3d at 30. Nevertheless, the court upheld the rule change, noting that the fact that "'the evidence in the record may also support other conclusions . . . [does not] prevent us from concluding [the agency] decisions were rational and supported by the record.'" *Id.* at 31 (quoting *Lead Industry Association v. EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980)).

Thus, the D.C. Circuit and the Eighth Circuit are in accord. Both courts found the agency rationale was stated in the

administrative record with sufficient clarity. Unlike the cases cited by Petitioners, here the Eighth Circuit Court of Appeals was not faced with *post hoc* rationalizations of counsel or new evidence submitted to the trial court.[8] Its decision was based solely on the relevant decision documents and the administrative record compiled in the agency proceedings.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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[8]The Court of Appeals specifically explained that it could not accept such reasoning. 421 F.3d at 634 (Pet. App. at 22a).

(4)

No. 05-631

In The Supreme Court of the United States

ENVIRONMENTAL DEFENSE, NATIONAL WILDLIFE FEDERATION

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS,

Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF ENVIRONMENTAL DEFENSE AND NATIONAL WILDLIFE FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MARCH 27, 2006

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Central to judicial review under the Administrative Procedures Act is the distinction between an agency's explanation of its decision, the findings that support this explanation, and data and evidence that support the findings. This Court has frequently reiterated that an agency must itself "articulate" a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983) (citations omitted). A reviewing court must then engage in a "searching and careful" yet deferential review of the record to determine if it rationally supports the findings or if "there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416(1970); *Motor Vehicle*, 463 U.S. at 43.

The government's opposition to *certiorari* obfuscates these distinctions – it acknowledges this Court's holdings but twists them beyond recognition. The government argues that a reviewing court should uphold an agency action if it can infer an explanation from any data in a voluminous record or a lengthy decision document. This theory dispenses with the requirement that an agency make findings to support its explanation, and that an agency provide an actual explanation of the connection between the facts found and the choice made. As such, this theory inherently converts judicial review from an analysis of the agency's reasoning into a scavenger hunt trying to hypothesize any rational basis for agency action from the underlying data.

Ironically, a major factual error in the government's brief – since acknowledged by the government itself – highlights the flaw with this approach. To explain why the U.S. Army Corps of Engineers rejected the more natural flow alternative to benefit endangered species required by the 2000 Biological Opinion, the government brief cites a chart in the

Environmental Impact Statement, which allegedly showed that this alternative would cost Mississippi River navigation $7.29 million in annual benefits. Fed. Op. at 19 n.4. This is wrong. The government has since filed a letter acknowledging that the natural-flow alternative actually improves Mississippi River navigation by $7.29 million. Letter from Paul Clement, Solicitor General to William K. Suter, Clerk, U.S. Supreme Court (March 17, 2006). The benefits of the natural-flow alternative to navigation on the Mississippi River are in fact more than double the estimated costs of the alternative to navigation on the Missouri River.[1] As such, the government cannot invoke burdens on navigation to justify the Corps' decision. DOJ's misread of the record not only highlights the irrationality of the Corps' decision, but also reaffirms the need for agencies themselves to provide a clear explanation for their decisions.

An agency explanation is the essential first step for judicial review because a court must then check that rationale against the agency's findings and the administrative record. In this case, the Fish and Wildlife Service (FWS) permitted the Corps to operate Missouri River dams without a low summer flow – one half of the natural hydrograph -- though FWS, following the consensus biological judgment in the record, explicitly found such flows critical to the survival of

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[1] Although the natural-flow alternative (GP2021) would increase Mississippi River navigation benefits by $7.29 million per year, it would reduce Missouri River navigation benefits by only $3.18 million. See J.A. X:7853 (Table 7 12-1 showing increase of $8.80 million in benefits for CWCP, current management, and $5.62 for GP2021). The calculation of Missouri River impacts occurred before the last two commercial barge operators exited the Missouri River, so the real impact is almost zero. Pet. 29. Mississippi River barges benefit because water now used to support minimal barging on the Missouri in the summer is instead conserved and released at times more beneficial to the Mississippi. J.A. X:7595 (discussing advantage of more natural flow, there called "split season," alternative).

the endangered pallid sturgeon. Meanwhile the Corps rejected a natural flow regime despite its own findings of overall economic and environmental benefits. Neither FWS nor the Corps offered the explanations government counsel attribute to them probably because these explanations contradict their actual findings and a unanimous record.

I. Precedent does not permit agency counsel or a court to infer an explanation from data alone.

Although both the government and the Eighth Circuit quote this Court's applicable precedent, they twist its import to convey the opposite meaning. Thus, the Eighth Circuit acknowledged that FWS's 2003 Amended Biological Opinion fails to explain why the Corps could cease providing low summer flows once the agency met a small part of its separate requirement to mechanically produce habitat. The Eighth Circuit dismissed this omission, holding that, "The rationale is present in the administrative record underlying the document, and this is all that is required." *Missouri System Litigation*, Pet. App. 22a. The Eighth Circuit similarly acknowledged that the Corps had failed to explain in "prose" why it rejected the more natural flow alternative. Pet. App. 26a. But the Court upheld the agency's flow choice because data presented in tables within the EIS purportedly explained it. Pet. App. 26a. Endorsing this view, the government argues that even without an explanation, the FWS decision was valid because "there was a 'rational connection' between the facts in the record . . . and the agency's decision." Fed Op. at 16 (emphasis supplied).

What the Eighth Circuit and the government omit is the requirement that the agency itself "articulate" the alleged rational basis for its decision. *Motor Vehicles*, 463 U.S. at 43. Contrary to the Eighth Circuit's holding, the agency must explain its flow choice with at least some "prose" because data alone is not self-explanatory. Nor can data alone express the biological judgment necessary to answer a

biological question. Without a clear agency explanation, a government's lawyer, or the court itself, is forced to create an explanation from the underlying data. Without an articulated explanation, there is no basis for according deference because there is no expert opinion to afford deference to. *See Motor Vehicle*, 463 U.S. at 48.

The government defends its novel legal position by relying on cases in which this Court has upheld agency decisions "of less than ideal clarity" because "the agency's path may reasonably be discerned." Fed. Op. at 14, *quoting Bowman Transportation, Inc. v. Arkansas Best Freight Sys. Inc.*, 419 U.S. 281, (1974) (other citations omitted). But this Court did not infer an explanation from the underlying data in these cases. Rather, the agency itself provided at least a "'curt'" explanation for its action, which according to this Court, "surely indicated the determinative reason for the final action taken." Fed. Op. at 14 (*quoting Camp v. Pitts*, 411 U.S. 138 (1973)). In this case, the agencies did not provide a "curt" explanation with the "determinative reason" – they failed to provide any "prose" explanation whatsoever. *Missouri System Litigation*, Pet. App. at 26a.

There is, to be sure, some tension between this Court's competing instructions that an agency must "cogently explain how it exercised its discretion," and its willingness to accept an explanation of "less than ideal clarity." *Compare Motor Vehicle*, 463 U.S. at 48 *with* 463 U.S. at 43. This case highlights why this Court should clarify these different instructions because the government and the Eighth Circuit have demonstrated that a rule permitting explanations of "less than ideal clarity" can be construed as a rule that allows courts to supply reasons the agency never articulated at all. Because such a rule would undermine the basic premise of administrative law, the government's brief demonstrates the significance of the question presented.

II. An explanation may not conflict with actual agency findings.

Identifying the agency explanation is only the first step of judicial review: As *Motor Vehicles* holds, the court must then assess the rational connection to the facts found, and their rational connection to the record. This case raises the question of whether a Court may not only infer an explanation from data alone, but whether the Court may accept explanations that contradict actual agency findings.

The issue before the FWS in the fall of 2003 was not whether it should reconsider its finding that dam operations jeopardized terns, plover and sturgeon, but only whether it should reverse its 2000 finding that their survival required both mechanical habitat efforts and at least modest restoration of natural flows. *Missouri River System Litigation*, Pet. App. 8a.[2] For pallid sturgeon, the answer in the 2003 Amended BiOp was explicitly no. The FWS found the mechanical "habitat restoration program in the Lower Missouri River will have little benefit to the pallid sturgeon without a concurrent or subsequent change in operations to provide a more normalized hydrograph to (1) provide the spawning cues that are critical for pallid sturgeon reproduction [i.e., the spring rise] and (2) allow larvae and juveniles to move into shallow water habitat [i.e., the summer low flow]." *Missouri River System Litigation*, Pet. App. 21a (quoting 2003 Amended BiOp); *see also* Pet. 11-13 (providing five quotations to same effect).

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[2] *See* 2003 Amended BiOp, J.A. IX:6629 ("The scope of this consultation is limited to specific alternative elements offered by the Corps for specific elements in the 2000 RPA."); *Missouri River System Litigation*, Pet. App. 8a (in 2003, "the Corps prepared a new Biological Assessment with the goal of finding a way to avoid jeopardy to the protected species without following the 2000 BiOp RPA flow requirements.").

The government identifies a parenthetical statement in the Amended BiOp noting that low summer flows – among other benefits – would automatically lower water levels enough to produce almost 1,200 acres of shallow water in the summer. Fed. Op. at 16 (citing BiOp). This means, of course, that low flows can replace some of the mechanical efforts otherwise required for species survival (6% of the total mechanical habitat requirement of almost 20,000 acres, Pet. 7, 14). But this statement says nothing about whether mechanical habitat efforts can in turn replace low flows. To the contrary, as quoted above, FWS explicitly found that mechanical efforts would not work unless coupled with "a more normalized hydrograph."[3] *Missouri System Litigation*, Pet. App. 23a. No respondent has disputed that a unanimous record backs this finding, including reports by an independent science panel and by the National Academy of Sciences. Pet. 8. *American Rivers v. U.S. Army Corps of Engineers*, Pet. App. 93a-94a.[4]

The Corps also considered whether it should modestly restore the natural hydrograph when it amended the Missouri Master Manual to better achieve project goals. The EIS found that the flow changes required by the 2000 BiOp had overall economic and environmental benefits, Pet. 14-15; *American Rivers*, Pet. App. 94a, and the government's opposition acknowledges that the Corps was obligated to explain why it rejected the more natural-flow alternative.

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[3] The Amended BiOp states that low flows are not only necessary to make these mechanical efforts work, but they also "enhanced in-channel productivity and provide for the spatial and temporal concentration of forage and prey items to areas where YOY [young of year] and adult fish can exploit the prey base." J.A. IX:6850.

[4] The government also quotes out of context a FWS statement accepting Corps' claims about the value of flows for habitat, but as the 8th Circuit noted, Pet. App. 23a, this statement dealt solely with sandbar habitat for terns and plovers not fish habitat (J.A. IX:6633). In fact, the EIS found the opposite even for the birds. Pet. at 13 n. 5.

Fed. Op at 17. Yet, the Eighth Circuit found that the Corps failed to do so in "prose," *Missouri System Litigation*, Pet. App. 26a, and the government does not dispute this finding.

Instead, the government argues here, as it did below, that the explanation was implicit because a reviewing court could examine data tables listing economic benefits for different alternatives, which indicated that the Corps' alternative was preferable for some categories of economic benefits. The government fails to point out, however, that the EIS is more than 800 pages long and contains more than 150 tables and figures that analyze the effect of myriad alternatives against a multitude of economic and environmental criteria for different river segments. J.A. IX:7216-8030. Altogether, the EIS presents thousands of separate data points. The government's attempt to cherry-pick from these data only highlights the distinction between offering data and providing a rational explanation for the decision. The criteria that normally govern Corps selection of water projects focus on net benefits produced by various alternatives, adding up all economic categories and balancing them against environmental effects. Water Resources Council, *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies* v (1983). The Corps itself never claimed to base its decision on only a partial picture of economic effects, let alone explained why that would make sense. *See Motor Vehicle*, 463 U.S. at 48 (agency must address logical alternative to its approach).

The government's inability to properly interpret the tables illustrates why the agency's explanation must be given in "prose" form. As discussed above, the government's brief erroneously stated that the natural-flow alternative would harm Mississippi River navigation – in fact, the natural-flow alternative has beneficial impacts on Mississippi River barging and barging overall. See *supra* at 2. The government's brief also erred by claiming the Corps' flow alternative "maximizes revenue from hydroelectric power"

compared to the natural-flow alternative. Fed. Op. at 19 n.4. In fact, the natural-flow alternative produced $6 million more per year in hydropower benefits than the chosen Corps alternative.[5] For this reason, the Eighth Circuit claimed only that the Corps' mechanical alternative produced more benefits in the summer. *Missouri System Litigation*, Pet. App. 26a. The government's attempt to mischaracterize this statement implicitly conveys the irrationality of the Eighth Circuit's selective approach.[6] In short, the government cannot produce a basis for the agency decisions consistent with their findings – let alone a basis they actually followed.

III. Explanations suggested by Missouri and Nebraska misstate the record.

Contradicting both the Eighth Circuit and the government, Missouri and Nebraska claim that FWS and the Corps did explain their decisions in prose. But their brief in opposition to certiorari misstates the agency decisions.

First, Missouri and Nebraska point to language in the final chapter of the Master Manual EIS, which allegedly explains why the Corps selected its flow alternative over the natural-flow alternative. Brief of Missouri at 9-14. In fact, this language explained only the advantages of the Cops' alternative over existing water management, not over the

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[5] J.A. at X.7859 (Table 7 13-1) (GP 2021, the natural-flow alternative, produced $678.8 in annual hydropower benefits, compared to $672.8 million for MCP, the chosen alternative).

[6] The government is correct that the chosen alternative (MCP) has lower damages to crops and groundwater than the natural-flow alternative, but the combined differences are only $420,000 per year. (For flood control benefits, see J.A. X:7760 (Table 7 8-1) showing MCP with $408.04 million and GP2021 with $407.71 million and for groundwater damages, see J.A. X:7764, (Table 7 8-3) showing MCP with $1.38 million in damages compared to GP2021 with 1.47.). That represents roughly .1% of such benefits, and an even smaller percentage of the $1.8 billion in total benefits from river management.

natural-flow alternative. It is undisputed that the natural-flow alternative has the same advantages over existing water management.[7] Accordingly, the Eighth Circuit acknowledged that this language did not explain the Corps' decision to reject more natural flows. Pet. App. 25a. The Eighth Circuit therefore agreed that the Corps had failed to explain its decision in "prose" and relied instead on an explanation inferred from data tables presented elsewhere in the EIS. *Missouri System Litigation*, Pet. App. 26a.

Missouri and Nebraska also focus on explanations in the 2003 Amended BiOp for dropping flow changes for terns and plovers. Petitioners acknowledged such an explanation for the birds (Petition at 13 & n 5) – but it stands in contrast to the complete lack of explanation for deleting low flows for sturgeon. In addition, as Petitioners have explained, other parts of the Amended BiOp devoted to terns and plovers found the opposite -- that their survival "depends on restoration of riverine form and functions, as well as some semblance of the pre-development or natural hydrograph." J.A. IX:6802 & 6804. Missouri and Nebraska do not acknowledge, let alone reconcile, these contradictions.[8]

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[7] The advantages were more water conservation in extended droughts, meeting environmental laws, and providing for Congressionally authorized uses. Pet. App. 25a. The Corps found the natural flow alternative had at least the same advantages. J.A. at X:7922 (all final alternatives contain same drought conservation measures), X:7986-87 (all alternatives meet all authorized purposes), Pet. 15 n.8 (showing natural flow alternative better for all major environmental criteria in EIS).

[8] Missouri and Nebraska also try to cobble together an explanation for the pallid sturgeon, but the statements they cite never address why low summer flows are not needed. They also claim that other circuits do not require an explanation for agency decisions but require only justification in the record. Petitioners stand by their representation of these cases. More generally, respondents misuse case law requiring deference to agency explanations for the different and wrong principle that courts need not require explanations in the first place.